

Information and Privacy Commissioner,  
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,  
Ontario, Canada

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## **ORDER PO-3160**

Appeal PA11-511

Ministry of Community Safety and Correctional Services

January 31, 2012

### **Summary:**

The appellant submitted an access request to the Ministry of Community Safety and Correctional Services pursuant to the *Freedom of Information and Protection of Privacy Act* for information relating to a motor vehicle accident. The ministry granted partial access, denying access to the non-disclosed information pursuant to the discretionary personal privacy exemption in section 49(b). In support of its section 49(b) claim, the city raised the presumptions in sections 21(3)(a) (medical history) and (b) (investigation into violation of law) and the factor in section 21(2)(f) (highly sensitive). The appellant appealed the ministry's decision to deny access to a witness statement. In this decision, the adjudicator upholds the ministry's decision to deny access to the witness statement.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 2(1) (definition of "personal information"), 21(2)(d) and (f), 21(3)(a) and (b), 49(b)

**Orders and Investigation Reports Considered:** Orders MO-1436, M-1146, PO-1728, P-689 and P-447

## **OVERVIEW:**

[1] The appellant submitted a request to the Ministry of Community Safety and Correctional Services (the ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information in relation to a particular motor vehicle accident:

...a copy of the statements given by the drivers and any witnesses with respect to this accident...

[2] The ministry granted partial access to the responsive records, denying access to the withheld portions pursuant to the discretionary personal privacy exemption in section 49(b) of the *Act*. In support of its section 49(b) claim, the ministry raised the presumptions in sections 21(3)(a) (medical history) and 21(3)(b) (investigation into violation of law) and the factor in section 21(2)(f) (highly sensitive).

[3] The appellant appealed the ministry's decision.

[4] During the course of the mediation stage of the appeal process, the mediator attempted to notify a number of affected parties for the purpose of obtaining consent to the disclosure of information contained in the records to the appellant. The mediator obtained the consent of one affected party and forwarded it to the ministry.

[5] The ministry subsequently issued a supplementary decision in which it disclosed additional information to the appellant. In the supplementary decision, the ministry confirmed that it was continuing to withhold some of the information at issue pursuant to the section 49(b) exemption.

[6] The parties were unable to resolve this issue during mediation and the file was transferred to the adjudication stage of the appeal process for an inquiry, in which the parties are invited to provide written representations in response to a Notice of Inquiry on the issues in dispute after which an adjudicator issues a written decision.

[7] As the assigned adjudicator, I commenced my inquiry by issuing a Notice of Inquiry and seeking representations from the ministry and one affected party. The ministry submitted representations in response and agreed to share them, in their entirety, with the appellant. The affected party did not submit representations.

[8] I then sought representations from the appellant and enclosed a complete copy of the ministry's representations with the Notice of Inquiry. The appellant submitted representations in response.

[9] In the discussion that follows, I reach the following conclusions:

- the record contains the personal information of the appellant, the affected party and two other identifiable individuals;
- the record qualifies for exemption under section 49(b); and
- the ministry properly exercised its discretion in denying access to the record under section 49(b).

## **RECORDS:**

[10] There is one record at issue, consisting of the witness statement of an affected party.

## **ISSUES:**

- A. Does the record contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?
- B. Does the discretionary exemption at section 49(b) apply to the information at issue?
- C. Did the ministry exercise its discretion under section 49(b)? If so, should this office uphold the exercise of discretion?

## **DISCUSSION:**

### **A. Does the record contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?**

[11] In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. That term is defined in section 2(1) as follows:

"personal information" means recorded information about an identifiable individual, including,

- (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,

- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
- (c) any identifying number, symbol or other particular assigned to the individual,
- (d) the address, telephone number, fingerprints or blood type of the individual,
- (e) the personal opinions or views of the individual except if they relate to another individual,
- ...
- (g) the views or opinions of another individual about the individual, and
- (h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

[12] The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information [Order 11].

[13] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual.<sup>1</sup> In addition, to qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.<sup>2</sup>

[14] As stated above, the record at issue is an affected party's witness statement. Having carefully reviewed its contents, I find that it contains principally the affected party's personal information, as defined by section 2(1), including their name, address, telephone number, driver's licence, occupation and name of employer, medical condition at the scene of the accident and their views and opinions regarding the motor vehicle accident. To a lesser extent, the record also contains the personal information of three other identifiable individuals, including the appellant and two other individuals involved in the accident. The information about the appellant includes the views or

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<sup>1</sup> Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F, PO-2225.

<sup>2</sup> Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

opinions of the affected party about the appellant's involvement in the accident. The information about one of the two other identifiable individuals includes the views of the affected party about this person's medical condition as a result of the accident. The information about the other identifiable individual includes the affected party's views or opinions about that individual's participation in the accident.

**B. Does the discretionary exemption at section 49(b) apply to the information at issue?**

[15] Section 47(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. Section 49 provides a number of exceptions to this general right of access, including section 49(b), which states:

A head may refuse to disclose to the individual to whom the information relates personal information,

where the disclosure would constitute an unjustified invasion of another individual's personal privacy

[16] Section 49(b) introduces a balancing principle that must be applied by institutions where a record contains the personal information of both the requester and another individual. In this case, the ministry must look at the information and weigh the appellant's right of access to her own personal information against the affected parties' right to the protection of their privacy. If the ministry determines that the release of the information would constitute an unjustified invasion of the affected parties' personal privacy, then section 49(b) gives the ministry the discretion to deny access to the appellant's personal information.

[17] In determining whether the exemption in section 49(b) applies, sections 21(1), (2), (3) and (4) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the affected parties' personal privacy. Section 21(2) provides some criteria for the ministry to consider in making this determination; section 21(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy; and section 21(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy. In addition, if the information fits within any of paragraphs (a) to (e) of section 21(1), disclosure is not an unjustified invasion of personal privacy under section 49(b). The information at issue in this appeal does not fit within paragraphs (a) to (e) of section 21(1).

[18] Therefore, in this case, I will consider paragraph (f) of section 21(1) and determine whether disclosure of the information in the record at issue "does not constitute an unjustified invasion of personal privacy."

[19] None of the section 21(4) exceptions apply in the circumstances of this appeal. Similarly, the “public interest override” in section 23 has not been raised or argued in this appeal and would not apply, in any event. Accordingly, my analysis will be based on the application of the presumptions in section 21(3), the factors in section 21(2) and any unlisted factors.

[20] The ministry relies on the presumptions in sections 21(3)(a) and (b) and the factor in section 21(2)(f). Those sections state:

(2) A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,

(f) the personal information is highly sensitive;

. . . . .

(3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,

(a) relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;

(b) was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;

[21] Citing the application of the presumption in section 21(3)(a), the ministry states that the personal information contained in the record includes medical information about the affected party and another identifiable individual.

[22] With regard to the presumption in section 21(3)(b), the ministry states that the information in the record at issue consists of sensitive personal information that was compiled and is identifiable as part of an Ontario Provincial Police (the OPP) investigation into a possible violation of law that resulted from a motor vehicle accident involving the appellant. The ministry adds that as a result of this accident, charges were laid under sections 70(3)(a) and 130 of the *Highway Traffic Act* (the *HTA*). In support, it cites and discusses Orders PO-1728 and PO-2409. With regard to Order PO-1728, the ministry notes that while the appellants in that case sought only the name of an affected party contained in the information at issue, former Senior Adjudicator David Goodis found that the section 21(3)(b) presumption applied to the information at issue as it was clearly compiled and identifiable as part of an investigation into a possible violation of law under section 128 of the *HTA*. Similarly, the ministry notes that

Adjudicator Faughnan applied the section 21(3)(b) presumption to information contained in records relating to an OPP investigation in response to a motor vehicle accident. In that case, the adjudicator upheld the institution's decision, finding that the withheld information was compiled and is identifiable as part of an investigation into a possible violation of law as contemplated by section 21(3)(b).

[23] With regard to the factor in section 21(2)(f), the ministry submits that the information contained in the record at issue consists of highly sensitive personal information to the extent that disclosing it would cause the individuals named in it excessive personal distress [Order P-1208].

[24] In response, the appellant states that she was an innocent victim of a motor vehicle accident and she seeks the information at issue in order to obtain the names, addresses and insurance details for the drivers of the other vehicles in the accident in order to commence a civil action for damages suffered as a result of the accident.

[25] The appellant suggests that the *Act* was "never designed to protect the tortfeasor or a wrong-doer or an individual who commits a wrongful act that injures another and for which the law provides a legal right to seek relief against that defendant in a civil court action."

[26] The appellant adds that the information being sought is

not of such a sensitive nature that it would infringe on anyone's privacy, particularly given that they [bear] the responsibility for this motor vehicle accident and their name and address should be provided in order to accurately understand the redacted copy of the motor vehicle report.

[27] Having reviewed the contents of the record at issue and the representations submitted by the parties, I am satisfied that the information in the record was compiled as part of a police investigation into a possible violation of law under the *HTA* following a motor vehicle accident involving the appellant. Accordingly, I find the presumption in section 21(3)(b) applies in the circumstances of this appeal and disclosure of the information at issue is presumed to be an unjustified invasion of personal privacy under section 49(b).

[28] However, a finding that the section 21(3)(b) presumption applies does not conclude my analysis under section 49(b). The section 21(3)(b) presumption is rebuttable and I must also consider the extent to which the factors in section 21(2), as well as any other unlisted factors, weigh for or against disclosure.

[29] In my view, in addition to the factor in section 21(2)(f), which has been raised by the ministry, the factor in section 21(2)(d) may be relevant in determining whether a disclosure of the personal information in the record at issue would constitute an unjustified invasion of personal privacy. Section 21(2)(d) states:

A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,

the personal information is relevant to a fair determination of rights affecting the person who made the request;

[30] The appellant indicates that she seeks the information at issue, particularly the names and contact information of affected parties, in order to commence a civil action for damages as a result of injuries she suffered in the accident. In my view, the appellant's stated motivation raises the possible application of the factor in section 21(2)(d). Some of the information in the record would clearly assist the appellant in identifying the name and contact information of one affected party and, as a result, it is relevant to a fair determination of the appellant's rights. I acknowledge the relevance of this factor and give some weight to it in support of disclosure.

[31] However, I disagree with the appellant's characterization of the information in the record as being not of such a sensitive nature that it would infringe on anyone's privacy. Rather, I am satisfied that it is highly sensitive personal information about the affected party and two other identifiable individuals due to the nature of the event and the ensuing police investigation. This raises the application of the factor in section 21(2)(f) and I give some weight to it in support of non-disclosure.

[32] While the appellant's interest in the information at issue is relevant to a fair determination of her rights, in my view, this factor alone is insufficient to overcome the presumption in section 21(3)(b). The section 21(3)(b) presumption is also bolstered by the sensitivity of the personal information and the appellant's ability to obtain the names and contact information for the identifiable individuals of interest through other means and then to commence civil proceedings.<sup>3</sup>

[33] For the reasons provided above, I find the information at issue in the record exempt pursuant to the exemption in section 49(b).

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<sup>3</sup> Regarding the ability of the appellant to obtain the name of an affected party in order to commence a civil proceeding, this issue has been adjudicated before (see Orders MO-1436, M-1146, PO-1728, P-689 and P-447).



[34] Finally, I will briefly address the ministry's responsibility under section 10(2) of the *Act* to sever and disclose to the appellant non-exempt information contained in the record. I have carefully examined the contents of the record and I find that the appellant's personal information is so inextricably intertwined with that of the other identifiable individuals, that disclosing any non-exempt information would only serve to provide the appellant with meaningless, disconnected snippets of information that would not, in any event, address what the appellant seeks – the affected party's name and contact information.

**C. Did the ministry exercise its discretion under section 49(b)? If so, should this office uphold the exercise of discretion?**

[35] In situations where an institution has the discretion under the *Act* to disclose information even though it may qualify for exemption, this office may review the institution's decision to exercise its discretion to deny access. I will review the exercise of discretion in this appeal since the ministry *could* have disclosed some of the personal information in the record.

[36] An institution must exercise its discretion. On appeal, this office may determine whether the institution failed to do so. In addition, this office may find that the institution erred in exercising its discretion where, for example, it does so in bad faith or for an improper purpose; it takes into account irrelevant considerations; or it fails to take into account relevant considerations. In either case, I may send the matter back to the institution for an exercise of discretion based on proper considerations.<sup>4</sup> I may not, however, substitute my own discretion for that of the institution.<sup>5</sup>

[37] Some of the factors considered relevant in the exercise of discretion are listed below. However, the individual circumstances of an appeal may render some of these factors irrelevant, and additional unlisted considerations may be relevant.<sup>6</sup>

[38] Considerations include:

- the purposes of the *Act*, including the principles that:
  - information should be available to the public;
  - individuals should have a right of access to their own personal information;
  - exemptions from the right of access should be limited and specific; and

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<sup>4</sup> Order MO-1573.

<sup>5</sup> Section 43(2).

<sup>6</sup> Orders P-344, MO-1573.

- the privacy of individuals should be protected;
- the wording of the exemption and the interests it seeks to protect;
- whether the requester is seeking his or her own personal information;
- whether the requester has a sympathetic or compelling need to receive the information;
- the relationship between the requester and any affected persons;
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person; and
- the historic practice of the institution with respect to similar information.

[39] The ministry states that it is mindful of the major purposes and objects of the *Act* and considers each access request on an individual, case-by-case basis. The ministry states that in this case it decided to exercise its discretion to release two statements to the appellant. With regard to the witness statement at issue, the ministry states that it carefully weighed the appellant's right of access against the privacy interests of the other individuals identified in the record.

[40] The ministry submits that it is satisfied that the release of the withheld statement would cause "personal distress to the affected party and one other person." The ministry concluded that the additional release of information was not feasible in this case since the affected party, who provided the statement, has not provided consent to the disclosure of their personal information.

[41] The appellant does not provide representations that address the ministry's exercise of discretion.

[42] I find that the ministry exercised its discretion in a proper manner, taking into account relevant considerations and not taking into account irrelevant considerations. In these circumstances, disclosure would constitute an unjustified invasion of the affected party's privacy, and the privacy of two other identifiable individuals. The information was compiled in the course of a law enforcement investigation and is sensitive information. The privacy rights of the affected party who provided the witness statement at issue (and those of the other individuals identified in the statement) outweigh the appellant's right of access to her own information under section 49(b).

**ORDER:**

I uphold the ministry's decision to deny access to the withheld record.

Original signed by: \_\_\_\_\_  
Bernard Morrow  
Adjudicator

\_\_\_\_\_ January 31, 2012